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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KENNETH BLOOR et al.,	
Plaintiffs and Appellants,	G039553
v.	(Super. Ct. No. 06CC08242)
BANKERS INSURANCE COMPANY,	O P I N I O N
Defendant and Respondent.	

Appeal from a judgment of the Superior Court of Orange County, Dennis S. Choate, Judge. Reversed with directions.

Nicholas & Butler, Craig M Nicholas, Alex M. Tomasevic and T. Russell Gibson; Allen & Lewis and Bryan M. Folger for Plaintiffs and Appellants.

Gaglione & Dolan, Jeffrey S. Kaplan and Deborah A. Smillie, for Defendant and Respondent.

Kenneth Bloor, Yvone Spadini (his wife), and Jasmine Spadini (their minor daughter) (collectively, Bloor) appeal from a judgment that dismissed their claims against Bankers Insurance Company (Bankers), after a demurrer without leave to amend was sustained. Bloor argues the complaint is sufficient to state the various causes of action alleged. We agree in part and reverse.

FACTS

Bloor was injured when large sheets of granite he was unloading from a truck shifted and fell on him. The granite had been loaded by Ollin International, Inc. (Ollin). Bloor obtained a judgment against Ollin but agreed not to execute on it, in return for an assignment of Ollin's claims against its insurer, Bankers. In this action, Bloor seeks to establish coverage and recover damages from Bankers on various theories. The properly pleaded, material facts alleged by the complaint are as follows:

In June 2002, Ollin's insurance broker, Warren Doctor, submitted an application for insurance to Bankers. On June 19, 2002, Bankers issued a commercial general insurance policy to Ollin through its California general agent, American Team Managers Insurance Services, Inc. (ATM). The policy period was June 19, 2002 to June 19, 2003.

At the time the policy was issued, there was no written agreement between ATM and Doctor, who was doing business as Doctor Insurance Agency. ATM, as general agent for Bankers, had the authority to hire other insurance agents and producers on behalf of Bankers. In July 2002, ATM did so, entering into a "brokerage agreement" with Doctor. It was alleged the agreement conferred on Doctor the powers and duties of an agent, not just a broker, but the terms of those powers and duties were not set out. In September 2002, ATM terminated the brokerage agreement with Doctor, but offered to continue to renew policies through him. Ollin was not notified of this.

On April 23, 2003, ATM engaged Doctor as its agent when it wrote to him offering to renew Ollin's policy for another year, asking him to collect the renewal premium and "gather other information." Although Ollin's address was shown on the declaration page of its policy, no copy of the letter was sent to it. Contrary to the letter, ATM and/or Bankers had already decided not to renew the policy.

On June 27, 2003, Ollin sent Doctor a check to renew the policy for another year, from June 20, 2003 to June 20, 2004. Acting as Bankers' agent, Doctor accepted the premium and deposited the check on July 2, 2003.

On July 7, 2003, Nishan Panosian of ATM notified Doctor by fax that no premium had been received, but said Bankers would rewrite the policy if a new application was submitted along with the premium. Doctor wrote to ATM that day, accepting the offer and sending along the premium. Doctor also called "employees" of ATM, who told Doctor the policy would be renewed if he forwarded the premium.

On July 28, 2003, Panosian wrote to Doctor to say Bankers would not renew the policy because ATM had terminated its relationship with him, and it returned the premium. ATM did not send a copy of this letter to Ollin. The same day, Doctor signed and sent to Ollin a certificate of insurance that stated it was insured by Bankers for the period commencing June 20, 2003 and ending June 20, 2004.

The complaint set out seven causes of action against Bankers. They are breach of contract (failure to indemnify and other misconduct), breach of the implied covenant of good faith and fair dealing (same), fraud (Doctor represented the policy had been renewed), estoppel (Bankers estopped to deny certificate of insurance issued by Doctor), violation of statutory provisions requiring notice of cancelation or notice of nonrenewal (Ins. Code, §§ 677.2, 678.1), and unfair competition (unlawful failure to send noticed of cancelation/nonrenewal and Doctor's fraudulent representation).[1]

[1] Further details will be set out in our discussion of each cause of action.

Bankers' demurrer argued the complaint failed to state facts sufficient to constitute a cause of action and was uncertain. (Code Civ. Proc., §§ 430.10, subds. (e), (f).) The trial court agreed on the first ground without offering any explanation. Judgment was entered dismissing the complaint against Bankers.[2]

I

Bloor argues the breach of contract and breach of the implied covenant of good faith and fair dealing claims are sufficient because they allege Ollin's policy was renewed when Doctor accepted a renewal premium as agent for Bankers. Bankers counters there was no renewal because Doctor was not its actual or ostensible agent, and the complaint failed to plead the terms of the 2003-2004 policy. Bloor is right.

"An agency is either actual or ostensible." (Civ. Code, § 2298.) An actual agent is one "really employed by the principal" (Civ. Code, § 2299), while an ostensible agency exists where "the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code § 2300.) An agent has actual authority that "a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.)

The complaint adequately alleges Doctor was the actual agent of Bankers when he collected a renewal premium from Ollin, thereby renewing the policy for the 2003–2004 year. ATM employed Doctor as its actual agent when it asked him to collect the premium from Ollin, and by doing so, it allowed Doctor (and Ollin) to believe that payment would renew the policy. The policy had already lapsed (on June 19, 2003) by the time Ollin paid the premium on June 27, 2003. But whether there was a grace period to renew after the expiration date, and whether ATM negligently allowed Doctor to

[2] The complaint also named ATM and Doctor as defendants, along with Evanston Insurance Company. The latter issued a policy of insurance to Ollin effective November 1, 2003, subsequent to Bloor's injury on October 28, 2003. (Bloor claimed the Evanston policy became effective on October 27, 2003, the date Ollin agreed to purchase the insurance upon being told of the proposed premium.)

believe he had authority to renew the policy during a grace period, are questions of fact. They could be decided in Ollin's favor. Doctor's late acceptance of the premium, along with ATM's delay of more than two weeks after the expiration date before saying it was too late to renew, would support a finding the June 27, 2003 payment was made within the grace period. So the complaint is sufficient to allege Banker's policy was renewed for a second year and Ollin was covered at the time Bloor was injured on October 28, 2003.

Bankers argues there was no actual agency, but it never explains or discusses the issue. After making this assertion in a point heading in its brief, Bankers says nothing further about the issue, and it never addresses the consequences of ATM's conduct set out above. We deem the point waived.

Bankers contends there was no ostensible agency because it is not alleged Ollin relied on representations by Bankers concerning Doctor's authority. Instead, it says, the complaint only asserts Ollin relied on Doctor's own representations about his authority, specifically that he accepted the premium and issued a renewal certificate. In light of our conclusion the complaint adequately alleges the policy was renewed by Doctor acting as the actual agent of Bankers, we need not address this issue.

Bankers also asserts the complaint fails to adequately plead the terms of the renewal policy or attach a copy. We disagree. Bloor attached a copy of the 2002-2003 policy to the complaint and alleged it was renewed. To us, that satisfied the requirement that a plaintiff claiming breach of contract must either allege its terms or attach a copy of the agreement. (See, e.g., *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 18.)

Finally, Bankers argues the contract was not properly pleaded because the policy described Ollin's business as "tile/stone installation" while the renewal certificate said it was "marble and granite wholesale," and because the complaint is inconsistent in alleging the term of the renewal policy (at one point it says June 19, 2003 to June 19,

2004, and at another, June 20, 2003 to June 20, 2004). No authority is cited for the suggestion these inconsistencies amount to a failure to plead the terms of the renewal policy, and we are not prepared to so hold. For pleading purposes, the material terms of the renewal policy were adequately set out. So the complaint sets forth sufficient facts to state causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.

II

Bloor argues the fraud claim is sufficient in alleging Doctor, as agent for Bankers, misrepresented the policy had been renewed when he accepted Ollin's premium and again when he issued the renewal certificate. Bankers counters an insurer is not vicariously liable for the fraudulent conduct of an insurance broker unless it ratifies the conduct. Again, we have to agree with Bloor.

The question for decision is whether a principal is liable for the fraud of its agent, since the complaint adequately alleges Doctor was Bankers' actual agent. The answer is "yes."

The general rule is that a principal is liable for the fraud of his agent committed within the scope of the agent's employment. (*Grigsby v. Hagler* (1938) 25 Cal.App.2d 714, 715.) So the allegation that Doctor committed fraud while acting within the scope of his employment as Bankers' agent is sufficient to state a cause of action.

Bankers is mistaken in suggesting that a principal's liability for an agent's fraud is limited to situations where it ratifies his conduct. The argument relies on *Schultz Steel Co. v. Hartford Accident & Indemnity Co*. (1986) 187 Cal.App.3d 513, but the case is distinguishable. There, the court held an insurer was not liable for its agent's alleged negligence in failing to recommend the insured take higher coverage, since making such recommendations was not within the agent's authority, the company never represented it would provide such advice, and it never ratified the agent's conduct. (*Id*. at pp. 523-524.)

The case does not stand for the proposition that a principal is liable for its agent's fraud only if it ratifies the conduct, and it has no bearing here. The fraud claim is sufficient to withstand a demurrer.

III

The estoppel claim is closely related. It alleges Bankers is estopped to deny Doctor's representations the policy was renewed, made when he accepted the premium and issued the renewal certificate. This cause of action also alleges Doctor knew coverage was not in force when he issued the renewal certificate (ATM's July 28, 2003 letter had returned the premium), but did so to conceal Bankers' rejection.

Bloor contends the complaint alleges the necessary elements of promissory estoppel. Bankers argues it made no representations and is not liable for Doctor's conduct. Bloor is right on this one, too.

The agency defense is no better here than on the contract and fraud claims. For pleading purposes, an agency is alleged, so the demurrer should have been overruled as to the estoppel claim.

IV

The next issue is the cause of action for violation of statutory provisions that require an insurer to send the insured notice of cancelation, or nonrenewal, when it makes either decision. Bankers argues no notice was required because the April 23, 2003 offer to renew was never accepted, so the policy expired. Bloor's position is the policy was renewed, and Bankers later canceled it or changed its mind and decided not to renew. We conclude a cause of action is stated.

To flesh out the details, we turn to the complaint. It alleges ATM's July 28, 2003 letter saying it would not renew the policy, and returning the premium, was a cancelation of the policy that had been renewed when Doctor accepted Ollin's premium and notified ATM it accepted the offer to renew. Bankers was required to send notice of cancelation to Ollin (Ins. Code, § 677.2) but failed to do so. Alternatively, it is alleged

the July 28, 2003 letter reflected a decision not to renew the policy, and Bankers failed to send Ollin required notice of nonrenewal. (Ins. Code, § 678.1.)

When an insurer decides to cancel commercial liability insurance (Ins. Code, § 675.5, subs. (a), (b)), notice of cancelation in writing must be delivered or mailed to the producer of record and the named insured at the mailing address shown on the policy. (Ins. Code, §§ 677.2, subds. (a), (b).) Notice must be provided at least 30 days prior to the effective date of cancelation, subject to exceptions not applicable here. (*Id*., § 677.2, subd. (c).) If an insurer declines to renew such a policy, notice of nonrenewal must be delivered or mailed to the producer of record and the named insured at the mailing address shown on the policy at least 60 days, but not more than 120 days, prior to the end of the policy period, along with the reasons for nonrenewal. (Ins. Code, § 678.1, subds. (a), (b), (c).) Failure to give notice continues the policy for 60 days after the insurer gives the notice. (*Id*., § 678.1, subd. (d).)

Whether the policy was renewed, as Bloor alleges, is a question of fact to be considered at a later stage of the case. At this point, where the facts alleged would permit a renewal finding, it follows the instant claims for breach of the statutory notice requirements state a cause of action. Put another way, Bankers' expiration theory is a defense that remains to be tested before a trier of fact. Since a demurrer admits all facts properly pled, we must assume the policy was renewed. Since it is alleged notice was never given to Ollin, as required for either cancelation or nonrenewal, the demurrer should have been overruled as to this cause of action.

Bankers' reliance on *Kates v. Workmen's Auto Ins. Co*. (1996) 45 Cal.App.4th 494, does not advance its cause. That court concluded an *automobile insurance* policy expired at the end of the policy period where the insurer offered to renew upon payment of the premium, but the insured never paid up. As the court made clear (*id.* at pp. 499, 504), the decision turned on its construction of statutory provisions governing cancelation or failure to renew *automobile insurance*. (Ins. Code §§ 660-

669.5 [div. 1, part 1, ch. 10].) Those rules are not at issue here. Rather, we deal with rules for cancelation and failure to renew certain types of property insurance, found in a different chapter of the Insurance Code. (Ins. Code, §§ 675-679.7 [div. 1, part 1, ch. 11].) Since Bankers does not assert the two sets of rules are similar, nor explain why a construction of the automobile insurance provisions should apply to those for property insurance, we cannot take any guidance from the decision. So the complaint states a cause of action for failure to send notice of cancelation or nonrenewal required by Insurance Code section 677.2 and 678.1, respectively.

V

Bloor argues the unfair competition claim is sufficient in alleging Bankers engaged in unlawful, unfair, and fraudulent conduct by failing to send notice of cancelation or notice of nonrenewal, and again when Doctor, its agent, misrepresented the policy had been renewed. Bankers disputes this on various grounds. Here, we have to agree with Bankers – no cause of action is stated under the unfair competition law.

The unfair competition law (Bus. & Prof. Code, § 17200 et seq.) prohibits unlawful, unfair or fraudulent business practices, among other things. (Bus. & Prof. Code, § 17200.) Its broad scope includes business practices that are prohibited by other laws (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*. (1999) 20 Cal.4th 163, 180), and an action may be brought by "any person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.) The available remedies are an injunction and restitution, but not damages. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.) Labeling a damage claim as one for disgorgement does not work: "[N]onrestitutionary disgorgement of profits is not an available remedy in an individual action under the [unfair competition law]." (*Id*. at. p. 1152.)

The flaw here is the relief sought. The complaint seeks to recover as "disgorgement and restitution" Ollin's defense costs in the action by Bloor, the judgment

obtained against Ollin, Bankers profits from its wrongful conduct, and premiums Bankers collected from its wrongful conduct. An injunction is sought to prohibit Bankers from "canceling . . . insurance policies without providing insureds with required notice, and denying coverage to insureds who did not have the opportunity to cure any alleged defect prior to attempted cancellation of the policy."

Bloor is seeking damages, not restitution, and that is not available under the unfair competition law. Of the various items labeled as restitution, the only one that fits into that category is restitution of the premiums Bankers collected. But that is the tail, not the dog. What Bloor really is after is the other items listed – defense costs and indemnification for the judgment Bloor recovered against Ollin. To the extent the claim seeks restitution, it fails.

The same is true of the injunction requested. The language of the complaint sounds like a class action allegation to enjoin future practices, but that is not this case. There are no class allegations. And, more tellingly, there is no future harm to enjoin, since Bankers has already denied coverage or, as alleged in the complaint, canceled or declined to renew the Ollin policy. To the extent injunctive relief is sought, the claim fails since there is nothing to enjoin. The demurrer was properly sustained as to Bloor's fifth cause of action for violation of the unfair competition law.

Since the complaint alleges facts sufficient to state causes of action for breach of contract, breach of the covenant of good faith and fair dealing, fraud, estoppel, and failure to send statutory notice of cancellation or nonrenewal of an insurance policy,

the demurrer to these causes of action should have been overruled. The judgment appealed from is reversed, and the trial court is directed to enter a new order overruling the demurrer as to these causes of action. Bloor is entitled to costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.